Supreme Court, U.S.
FILED

09-841 JAN 4 - 2010

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No. _____

In The

Supreme Court of the United States

HOUSTON INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

VP, BY NEXT FRIEND JUAN AND SYLVIA P.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In cases construing the free appropriate public education requirement of the Individuals with Disabilities Education Act ("IDEA"), must courts disregard objective evidence of educational benefits received by a child, if those benefits are a result of teaching strategies not specifically enumerated in a child's individual education plan, or shall courts continue to rely on the standard enunciated in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and include in the analysis longstanding indicia of educational benefit, including achievement of passing marks and advancement from grade to grade in the regular classrooms of a public school system?

2. When a parent obtains administrative relief under the IDEA requiring a private educational placement, does the local school system, or the state, bear the responsibility to pay for maintenance of that placement during the pendency of judicial proceedings under the Act?

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PETITION FOR A WRIT OF CERTIORARI

The Houston Independent School District ("HISD"), Plaintiff in the District Court and Appellee/ Cross-Appellant in the Court of Appeals, petitions for a writ of certiorari to review the judgment of the United State Court of Appeals for the Fifth Circuit in *Houston Independent School District v. V.P. b/n/f Juan and Sylvia P., 5th Circuit Docket No. 07-20817* (September 9, 2009).

OPINIONS BELOW

There are five (5) opinions below; culminating in the Court of Appeals ruling that is the subject of this Petition. In chronological order they are:

1. *Valencia P. b/n/f Mr. and Mrs. Juan P. vs. Houston Independent School District;* TEA Docket No. 405-SE-0804 — **Final Decision of the Hearing Officer dated February 10, 2005**

2. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.;* C.A. No. H-05-1686; In the United States District Court for the Southern District of Texas, Houston Division — **Magistrate's Memorandum and Recommendation dated March 2, 2007**

3. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.;* C.A. No. H-05-1686; In the United States District Court for the Southern District of Texas, Houston Division — **Magistrate's Memorandum and Recommendation dated September 11, 2007**

4. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.*; No. 07-20817 — **Opinion dated April 23, 2009, withdrawn September 9, 2009**

5. *Houston Independent School District vs. V.P. b/n/f Juan and Sylvia P.;* No. 07-20817 — **Opinion dated September 9, 2009** (Rehearing decision replacing original opinion dated April 23, 2009)

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its final decision on September 9, 2009, and denied rehearing and rehearing *en banc* on October 7, 2009. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AFFECTED

The Individuals with Disabilities Education Act, 20 United States Code, Section 1400 *et. seq.*

1. Section §1401(9) of Title 20 of the United States Code provides:

> **Free appropriate public education**
>
> The term "free appropriate public education" means special education and related services that—
>
> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

2. Section 1414(d)(1)(A) of Title 20 of the United States Code provides in pertinent part:

Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

(I) a statement of the child's present levels of performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

* * * * *

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

* * * * *

(IV) a statement of the special education and related services and supplementary aids

and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

* * * * *

3. Section 1415(f)(3)(E) of Title 20 of the United States Code provides:

Decision of the hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

4. Section 1415(j) of Title 20 of the United States Code provides:

Maintenance of current educational placement

Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Assistance to States for the Education of Children with Disabilities, 34 Code of Federal Regulations, Part 300 *et. seq.*

1. Section 300.101(a) of Title 34 of the Code of Federal Regulations provides in pertinent part:

Free appropriate public education (FAPE).

(a) General. A free appropriate public education must be available to all children residing in the State between the ages of 3 and

21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in § 300.530(d).

* * * * *

(c) Children advancing from grade to grade.

(1) Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

* * * * *

2. Section 300.320 of Title 34 of the Code of Federal Regulations provides in pertinent part:

Definition of individualized education program.

(a) General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with §§ 300.320 through 300.324, and that must include—

(1) A statement of the child's present levels of academic achievement and functional performance, including—

(i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or

* * * * *

(2)(i) A statement of measurable annual goals, including academic and functional goals designed to—

(A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(B) Meet each of the child's other educational needs that result from the child's disability;

* * * * *

(4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child—

(i) To advance appropriately toward attaining the annual goals;

(ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and

(iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

* * * * *

3. Section 300.513 of Title 34 of the Code of Federal Regulations provides in pertinent part:

Hearing decisions.

(a) Decision of hearing officer on the provision of FAPE.

(1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

* * * * *

4. Section 300.518 of Title 34 of the Code of Federal Regulations provides in pertinent part:

Child's status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process hearing complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

* * * * *

> (d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

STATEMENT OF THE CASE

Factual Background

V.P. was a special education student in HISD with auditory and speech impairments. App. 2a. In spite of her disability, V.P. was in a regular education first grade classroom. App. 4a. Per the recommendations of an ARD Committee[1], she received numerous instructional modifications and services in the classroom. V.P. was instructed in and tested on the same State-mandated, first-grade curriculum as her non-disabled peers. App. 4a-5a, 21a-23a.

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[1] Under the Individuals with Disabilities Education Act ("IDEA"), special education students receive individualized instruction in accordance with an Individual Education Plan ("IEP") developed by a team comprised of school administrators, teachers, and the child's parents. *See* 20 U.S.C. §§1401(14), 1414(d). In Texas, the "IEP team" is referred to as the Admissions, Review, & Dismissal ("ARD") Committee. 19 TEX. ADMIN. CODE §89.1050; *see also Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 247 (5th Cir. 1997), *cert denied*, 522 U.S. 1047 (1998); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 346 (5th Cir.), *cert. denied*, 531 U.S. 817 (2000).

In addition to the classroom modifications required by her IEP, V.P.'s teacher implemented certain additional instructional modifications in her classroom to assist V.P. App. 20a. These additional modifications were relatively minor and did not change or reduce the State-mandated first grade curriculum.[2]

By the end of her first grade year, V.P. had successfully met the promotion standards established by HISD for all non-disabled students including passing grades in all classes, satisfactory performance on the standardized Stanford Achievement Test, and 100% mastery of the preset list of high frequency words. App. 22a-23a. V.P.'s standardized test scores also demonstrated significant academic gains. App. 23a. Although V.P. would continue to need modifications to accommodate her speech and hearing impairments, the ARD Committee recommended placement in a second grade regular education classroom for the 2004-2005 school year. App. 5a-6a.

V.P.'s parents had "expected more progress" and disagreed with the proposed program. App. 6a. Therefore, her parents unilaterally withdrew V.P. from HISD and enrolled her in a private school for children with language learning disabilities where she was placed, not in the second grade, but in a kindergarten/first-grade classroom with no opportunity to interact with non-disabled peers. *Id.*

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[2] V.P.'s teacher testified that she read the test instructions to V.P., pointed to pictures as appropriate, or gave her fewer test items.

Procedural Background

On August 20, 2004, V.P.'s parents filed a request for a "due process hearing" under the IDEA.[3] App. 7a. An evidentiary hearing was held in December 2004 and the hearing officer's decision was issued in February 2005. *Id.* The hearing officer concluded that V.P. had been denied a free appropriate public education ("FAPE") because the educational plan developed by HISD was not reasonably calculated to generate positive academic and nonacademic benefits. App. 7a-8a. HISD was ordered to reimburse V.P.'s parents for the 2004-2005 private school expenses. App. 8a.

This case was originally filed on May 10, 2005, as an appeal by HISD of the administrative hearing officer's decision that it had denied V.P. a FAPE under the IDEA. App. 8a; 20 U.S.C. §1415(i)(2)(permitting any party aggrieved by the findings and decision of the hearing officer to bring a civil action). V.P. filed an Answer and a Counterclaim in June 2005. App. 8a. Notably, she did not assert any claim for reimbursement with respect to any additional years of private school placement beyond the one ordered by the hearing officer. After HISD filed a Motion for Summary Judgment and V.P. responded, the Magistrate Judge issued recommendations on March 2, 2007, affirming the hearing officer's decision and awarding reimbursement of the private school costs associated with the 2004-2005 private school placement. App. 8a-9a.

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[3] *See* 20 U.S.C. §1415(f)(providing for right to impartial due process hearing).

The parties then filed cross-motions for summary judgment on the issue of reimbursement for V.P.'s continued placement at the private school during the 2005-2006 school year. App. 9a. V.P.'s parents had continued her placement in the private school without notice to HISD or the Court until a year after the case was on file and the next school year was over. App. 42a. The Magistrate recommended that V.P.'s request for pendency reimbursement for the 2005-2006 school year be denied because V.P. had failed to plead in the first instance or to seek to amend her pleadings to assert any right to reimbursement for the continued placement in the private school. App. 41a-42a. The District Court adopted both of the Magistrate's recommendations. App. 55a, 74a. V.P. appealed the Court's denial of the 2005-2006 tuition reimbursement. App. 9a. HISD cross-appealed the Court's finding that it had denied V.P. a FAPE under the IDEA. *Id.*

The Panel issued its initial opinion on April 23, 2009, affirming the District Court's decision that HISD had violated the IDEA, but reversing the District Court's refusal to award V.P. reimbursement for the 2005-2006 school year. Although the Panel denied HISD's first request for rehearing, it withdrew its first decision and issued a new opinion on September 9, 2009, reaching the same result. App. 1a-2a. The Court stated that V.P.'s passing grades and yearly advancement were not adequate measures of educational benefit because the improved grades and advancement resulted from modifications the regular education teacher implemented that were not included in her IEP. App. 25a. The Court stated that before passing grades and advancement can be seen as supporting a finding of educational benefit "those indicia must arise from compliance with and not

deviation from the IEP." App. 26a. With respect to the 2005-2006 reimbursement, the Court found that V.P. was excused from pleading for such relief because HISD was on notice of its legal obligation to maintain the placement at its expense throughout the pendency of the judicial proceedings. App. 50a. HISD filed a Second Petition for Rehearing which was denied on October 7, 2009. App. 160a-161a.

REASONS FOR GRANTING THE PETITION

It has been nearly thirty years since the Supreme Court issued its only opinion analyzing the substantive standard to be applied in determining whether a disabled child has received the "free appropriate public education" mandated by the IDEA. *See Bd. Of Educ. v. Rowley*, 458 U.S. 176 (1982). The court held that the IDEA does not guarantee maximization of the educational potential of disabled children. Moreover, in recognition of the Act's stated preference for mainstreaming, the court emphasized that the normal criteria for assessing positive educational benefit in regular education (*i.e.*, passing grades, test scores) are extremely important in determining whether disabled children in the mainstream are receiving a FAPE. The Fifth Circuit's holding in this case is in direct conflict with *Rowley,* as it holds that these classic indicia of progress in the mainstream must be "legally rejected" when they result from services provided to the child that are not specifically described in the student's IEP.

Neither *Rowley* nor the IDEA require that all instructional strategies employed in regular education classrooms be specifically identified in the IEP. Thousands of school districts that have relied for years on the *Rowley* standard to measure their own

compliance with the IDEA are now in a quandary concerning the extent to which good teaching practices must now be meticulously spelled out in the IEP lest they be judged to be immaterial in the determination of whether a special education student is receiving a FAPE. Sound educational policy and common sense mandate that the law give effect to all efforts of schools to educate disabled children, whether they are enumerated in the child's IEP, or merely the product of a regular education teacher's skill.

The Fifth Circuit's opinion is causing unnecessary confusion for educators dealing with the complexities associated with educating children with disabilities. Do educators now spend their precious time crafting lengthy IEPs that specify everything a regular education teacher may do in the classroom to ensure that students make satisfactory educational progress, or do they omit those details and risk that a court will find they have violated the IDEA even though the disabled child is receiving a positive educational benefit overall? Placing this burden on the scant resources available to public education systems at a time when their budgets are especially strained is simply wrong, and it is not justified by the IDEA, the court's holding in *Rowley*, or the educational needs of children with disabilities. In light of the vast amount of public dollars involved, and the impact this decision has on the education of our neediest children, this court's guidance is sorely required.

The maintenance of placement provision of the IDEA requires public funding of private school placements ordered by administrative hearing officers during the pendency of judicial proceedings under the Act. The IDEA regulations place this obligation on the

state, not the local school district. The Fifth Circuit's decision imposing this obligation on HISD is contrary to the regulation, and was premised on a fundamental misunderstanding of the reasons for shifting this burden to the state in the first place. According to the regulations, a private placement ordered by a hearing officer must be treated as an "agreement" between the state and the parents for purposes of maintaining the placement. Characterizing the local school system as having agreed to this placement, while it was appealing and arguing that the hearing officer's decision was incorrect, is nonsensical. Compounding its error, the Fifth Circuit reached this conclusion despite the fact that the claim for maintenance of placement reimbursement was never pled by the student's parents in the District Court and was rejected by the District Court for this very reason. By excusing the parents' failure to affirmatively seek the relief, HISD was effectively deprived of the opportunity to set forth the reasons why the state should have been held responsible for maintaining the placement, as opposed to HISD. This also poses a question of national importance, as the cost of private educational placements is substantial compared to the cost of public education. Placing this burden on the local school system further stretches the education dollar, and dilutes the financial ability of the school system to serve disabled children in its jurisdiction.

I. *Rowley*

Because of the IDEA's stated preference for mainstreaming, the vast majority of special education students in this country receive all, or a majority, of their education in regular classrooms. *See* 20 U.S.C. §1412(a)(5). Ensuring that each child receives an

educational benefit in the regular education classroom requires educators who are skilled, creative and responsive to individual needs. The efforts these teachers expend necessarily go beyond the four corners of a child's IEP. The IDEA does not purport to usurp the traditional role of the regular education teacher and it does not prohibit teachers from enhancing or supplementing a student's educational experience. *See O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 703 (10th Cir. 1998)(citing appendix to previous version of IDEA for conclusion that IEP is not intended to be a detailed instructional plan).

The IDEA ensures that each child with a disability has available to them a "free appropriate public education" or "FAPE." 20 U.S.C. §1400(d), §1411(a). For each child with a disability the local school district must convene a group of persons knowledgeable about the student's needs to develop an individualized education plan ("IEP"). 20 U.S.C. §1414(d)(1). Under the IDEA's procedures, the IEP must include, among other things, statements regarding the child's present levels of performance, statements regarding the goals designed to enable the child to be involved in and make progress in the general education curriculum, and a statement of the program modifications that will be provided to the child to enable him or her to meet the goals. 20 U.S.C. §1414(d)(1)(A)(i)(I, II, and IV). Although the IEP must specify the special education services the child will receive and modifications to the regular education environment, it is not as detailed as a daily "lesson plan" and is not intended to tell teachers how to teach. *See O'Toole*, 144 F.3d at 703.

In *Rowley*, the court held that the free appropriate public education ("FAPE") to which a student is

entitled to under the Act, is a "basic floor of opportunity" which consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the child. *Bd. of Ed. v. Rowley*, 458 U.S. 176, 201 (1982).[4] In determining the adequacy of the educational benefit conferred upon students with disabilities, the Court explained that where a child is "mainstreamed" in a regular education classroom with his/her non-disabled peers, the public school system monitors the educational progress of the child. *Id.* at 202-03. In that setting:

> [r]egular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit.

Id. at 203. Significantly, the IEP for the student in *Rowley* did not prescribe the teaching strategies to be employed by the regular education teacher to deliver the content of the course curriculum. Rather, it merely set forth the things that were required *in addition to* those ordinary strategies. *Rowley*, 458 U.S. at 184.

The court in *Rowley* noted that the IDEA's definition of a free appropriate public education requires, *inter alia*, an "appropriate ... elementary ...

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[4] The IDEA was previously known as the Education of the Handicapped Act. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982).

school education in the State involved," and services provided to the student "*in conformity with* the individualized education program." *Rowley*, 458 U.S. at 188 (emphasis added). The court ultimately found that the child's "academic progress, when considered *with* the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive." *Rowley*, 458 U.S. at 203, n.25 (emphasis added). Despite numerous amendments to the IDEA, *Rowley* remains the seminal case interpreting the educational benefit standard. *See e.g.*, *J.L. v. Mercer Island Sch. Dist.*, 575 F.3d 1025, 1027 (10th Cir. 2009)(concluding most recent amendments to IDEA did not alter *Rowley's* standard).

It is readily apparent that the IEP for the student in *Rowley* did not describe all of the services the student received that were provided as part of her "appropriate elementary education." The requirement that services be provided "in conformity with the IEP" does not mandate a detailed prescription of all teaching strategies that will be employed by a regular education teacher for children placed in regular education classrooms. Rather, it is plainly sufficient that the IEP simply indicate that the child will receive instruction in a given subject in a regular education classroom, and then go on to describe any supportive services that are necessary based on the student's disability to access the curriculum in that classroom. It would be needlessly redundant for the IEP team to describe the components of appropriate regular education instruction provided to all children, as it is plain that any child placed in the classroom will receive those things.

The Fifth Circuit ignored *Rowley* when it stated that "[a]s a legal matter, we find that [passing grades and advancement from year to year] should be rejected [as indicia of educational benefit] when it is found to be the product of unapproved deviations from the IEP." App. 26a. Notably, the court did not find that the services in question were proscribed by the IEP. The court offered no justification for its rejection of the undisputed evidence that V.P. benefited from these "unapproved" services, other than its reference to the fact that they were not described in her IEP. As these services enabled V.P. to obtain an adequate knowledge of the course material, they are entitled to be acknowledged through the grading and advancement system that this court identified as an important factor in determining educational benefit.

The IDEA merely requires that the services be provided to the child "in conformity with" the IEP, not that they be specifically enumerated therein. As was pointed out above, by placing a child in a regular education classroom, the IEP team is specifically approving the use of "best practice" regular education teaching methods for the student. As such, all of the services V.P. received were provided "in conformity with" her IEP, even though they were not specifically described therein. The Fifth Circuit's use of the phrase "unapproved deviations" is misleading as it suggests that the teacher was not following the IEP. To the contrary, supplementing the IEP services is not synonymous with failing to provide the services prescribed therein.

As previously noted, V.P. was instructed and tested on the same grade-level curriculum as her non-disabled peers and she passed every class, albeit with

the modifications. V.P. was responsible for learning the same State-mandated regular education first-grade curriculum as every other student in her class. V.P.'s teacher determined that measuring her progress in that curriculum required modifications, some of which were enumerated in her IEP and some which were not. Simply because her disability prohibits her from accessing that curriculum in the same manner as non-disabled students; *i.e.*, without modifications, does not render her passing grades meaningless.

The benefit V.P. received from the education provided to her exceeds the *Rowley* standard. In addition to her passing grades, V.P.'s standardized test scores, including the achievement test scores, are undisputed, reliable evidence of her educational benefit. Her scores on the Stanford and Woodcock Johnson Tests of Achievement demonstrate conclusively that she was making appropriate educational progress.[5] Although V.P. received accommodations to ensure she could hear the test proctor, these "standardized" tests were not otherwise modified *in any respect* for V.P. *See* App. 112a (noting modifications for standardized testing were approved by IEP). There is no justification for rejecting these results based on anything the teacher did in the classroom, as classroom modifications had no impact whatsoever on V.P.'s scores on these tests. V.P.'s successful performance on the standardized tests is

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[5] The Fifth Circuit acknowledged that HISD had pointed to objective evidence indicating that V.P. was receiving an educational benefit in her placement. The evidence established that V.P. had made nearly 3 years of progress in the 3 years she had been in HISD and that she was performing at or near the first grade level in most areas early in her first grade year. App. 23a.

solely the result of the fact that she was benefiting significantly from her education.

As this Court recognized in *Rowley*, the primary purpose of the IDEA is to ensure that children with disabilities receive an educational benefit. The Fifth Circuit's ruling elevates form over substance and holds that procedural compliance with IEP is paramount to the actual educational benefit a child receives. This is inconsistent with the IDEA and *Rowley*. Even if the educational benefit a child receives is a direct result of the unapproved modifications, it is still educational benefit. The school system that ensures a child receives an educational benefit in spite of a "procedurally deficient" IEP should be rewarded, not censured.

There is no valid reason to reject evidence of progress that results from educationally sound practices. There is no evidence to suggest that the teacher simply gave V.P. the correct answers or that her grades are an inadequate or unreliable indicator of educational benefit. Educators employ a variety of strategies and techniques in their classrooms that were never intended to be subsumed by the IEP process. Teachers everywhere are encouraged to provide "differentiated instruction" which involves alterations (modifications) to the way the class is taught to meet the needs of a diverse group of learners, disabled and non-disabled alike. *See e.g.*, *Ashli v. State of Hawaii*, Civ. No. 05-00429 HG-KSC, 2007 U.S. Dist. LEXIS 4927 *13-14, 31 (D.C. Hawaii Jan. 23, 2007) (recognizing teachers must have the flexibility to provide differentiated instruction to all students as needed in general education classrooms which can include reading test directions and providing

additional explanation on difficult lessons). The IEP was never intended to specify how general education teachers are to teach the general education curriculum. That is what good teaching is all about.

Under *Rowley,* HISD was not required to maximize V.P.'s educational potential. The fact that she cannot access the regular education curriculum in the same manner as her non-disabled peers, *i.e.*, without modifications, or that she will continue to need modifications in the future, does not establish a denial of FAPE. The Panel discounts the fact that V.P. met the same promotion standards applicable to non-disabled children because she had not "mastered" the first grade curriculum and would not have achieved passing grades without "modifications." However, *Rowley* made it abundantly clear that mastery of the curriculum is not required. Special education students frequently need "modifications," even when they are being educated in general education classrooms, to accommodate their disabilities. Some common modifications include shortened assignments, extended time for assignment completion, preferential seating, etc. These modifications do not dilute the curriculum, they merely facilitate a disabled child's access to it. V.P., who is a hearing impaired student like Amy Rowley, will likely always need modifications due to the nature and severity of her disabilities.

II. Procedural Violations under IDEA 2004

As previously noted, the IDEA requires that a student's IEP contain certain statements related to the child's performance, goals and program modifications. Thus, at worst, the failure of an IEP to contain all required modifications may constitute a "procedural

violation" of the IDEA. When the IDEA was amended in 2004, Congress stated, consistent with the existing case law, that procedural violations of the IDEA may result in a finding that the child did not receive a FAPE only if the hearing officer also finds that the procedural inadequacy:

> (1) impeded the child's right to a free appropriate public education;
> (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
> (3) caused a deprivation of educational benefits.

20 U.S.C. §1415(f)(3)(E)(ii). In situations where the school district commits a procedural violation of the IDEA, but the violation does not rise to the level of a denial of FAPE, hearing officers have authority to order the school district to comply with the procedural requirements. 20 U.S.C. §1415(f)(3)(E)(iii).

Other Circuits have recognized that the failure of the written IEP to contain all necessary statements is merely a procedural issue that does not necessarily deny FAPE. *See Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 611-13 (6th Cir. 2006)(finding failure of IEP to include statements regarding student's present levels of performance was a procedural violation that did not cause any substantive harm). The upshot of the Fifth Circuit's holding in this case is that the failure of the IEP to contain all required modifications is a *per se* denial of FAPE, as all evidence of positive benefit derived from modifications not described in the IEP is

to be legally rejected. This holding ignores Congress' admonition in the IDEA amendments. According to the statute, procedural deficiencies in the IEP (such as the failure to describe all required services) do not deny FAPE unless the child suffers some educational harm as a result. The appropriate response to procedural violations is not to reject all evidence of educational benefit, but rather to consider whether or not the failure to ensure procedural compliance harmed the student. *See* 20 U.S.C. §1415(f)(3)(E)(ii).

Clearly, the "unapproved" modifications at issue here did not harm V.P. or impact her parents' participation in the IEP process. To the contrary, the modifications permitted her to access the grade-level curriculum and receive an educational benefit as required by the substantive provisions of the IDEA. The "unapproved" modifications at issue here fall precisely within the scope of this regulation and are not inconsistent with the IDEA.

III. Liability for Pendency Placement

The IDEA provides that during the pendency of an administrative or judicial proceeding under the IDEA, the child shall remain in his/her "current educational placement" unless the parents and State or local educational agency agree otherwise. 20 U.S.C. §1415(j). The Department of Education has clarified that if an administrative hearing officer agrees with the child's parents that a change of placement is appropriate, the hearing officer's ruling must be treated as an agreement "between the State and the parents" for purposes of determining the "current educational placement." 34 C.F.R. §300.518(d). In this case, the hearing officer's ruling that V.P.'s parents

were justified in enrolling her in the private school created a right to pendency placement at the private school during the pendency of any appeals.

It is undisputed that V.P. did not raise any issue regarding pendency placement until June 9, 2006, when she asked the Court to admit as "additional evidence," the 2005-2006 private school bills in a motion titled "Defendant's Motion to Submit Additional Evidence." App. 8a. As the Fifth Circuit acknowledged, that motion was not filed until a year after her answer and counterclaim, and about a month after the school year in question had been over. App. 42a. At a hearing in August 2006 to consider V.P.'s motion to submit additional evidence, the Magistrate ruled that the 2005-2006 private school bills were not admissible because they were not related to the only issue before her, *i.e.*, the appropriateness of the hearing officer's decision. *See* App 40a, 63a.

The Magistrate Judge ruled that V.P. had failed to timely put HISD on notice of a claim for reimbursement of the 2005-2006 expenses. App. 71a. The Federal Rules require a party to make a "short and plain statement of the claim showing that the pleader is entitled to relief, and ... a demand for judgment for the relief the pleader seeks." FED. R. CIV. P. 8(a)(2). It is undisputed that V.P. failed to do this. Accordingly, the Magistrate refused to exercise her discretion to award the 2005-2006 expenses as "appropriate relief" under the IDEA. App. 71a. As stated by the Magistrate, "[t]he discretion of the court is broad, but not limitless. It does not grant the court the power to ignore the Federal Rules of Civil Procedure. The court will not impute notice on Plaintiff when Defendant has not followed the

pleading guidelines." *Id.* The Fifth Circuit reversed, finding that the Magistrate judge abused her discretion by refusing to excuse V.P.'s failure to properly plead her claim for "pendency placement" relief because the IDEA statute itself put HISD "on notice of a legal obligation." App. 50a.

HISD's Legal Obligation

The Fifth Circuit panel found that 34 C.F.R. §300.518(d) creates an absolute obligation *the school district* cannot avoid. As such, according to the opinion, HISD was on notice of its legal obligation. However, that regulation was changed, effective October 16, 2006, to clarify that only the state educational agency can be held responsible under the IDEA for maintaining the pendency placement. *See* 34 C.F.R. §300.518(d) (deleting reference to "or local educational agency"). Notably, a comment to the new regulation indicates that the change in the regulation was made so that it conformed with the longstanding judicial interpretation of the Act's pendency provision that a hearing officer's decision is favor of the parent constitutes an agreement "by the State agency and the parent" for purposes of determining the child's stay-put placement. 71 Fed. Reg. 46710 (Aug. 14, 2006) (recognizing hearing officer decision in favor of parent "is an agreement between the parent and the State, not the local education agency"). The effect of this change is the recognition that the local agency (the school district) does not have the obligation to fund pendency placements.

Had V.P.'s counsel timely asserted a claim for pendency reimbursement, HISD would have responded that it was not responsible and that V.P. needed to

bring the State of Texas into the lawsuit for purposes of recovering the stay-put expenses. The Court's holding that the magistrate abused her discretion is based on the flawed premise that HISD knew it would be liable for the expenses if a claim was timely asserted.

It is one thing to say that HISD was on notice that a claim could be made against it, it is quite another to say that HISD had "notice of a legal obligation." *See* App. 50a. V.P.'s parents never informed HISD that she would continue to attend the private school placement and certainly did not indicate she would seek reimbursement for that placement. Yet, the Panel's ultimate conclusion is based on the fact that by "operation of the precedents and federal regulations, HISD had notice of a legal obligation." *Id.* As was pointed out above, HISD was on no such notice as it believed, and believes, that the legal obligation belonged to the State of Texas, not HISD, to maintain the pendency placement.

CONCLUSION

Under *Rowley*, passing grades and advancement from grade-to-grade are objective indicia of educational benefit when a student is educated in the regular education classroom. The Fifth Circuit erred in rejecting all evidence of educational benefit resulting from educational services not described in the IEP. Its holding raises an important question of federal law which should be considered by this court. The Fifth Circuit also erred in holding HISD responsible for the pendency placement. For these reasons, the Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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